ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE: SPECIAL COUNSEL INVESTIGATION	Case No. 04 MS 297 (Chief Judge Thomas F. Hogan) (UNDER SEAL)

FILED

JUN - 4 2004

NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

MOTION OF NON-PARTY TIM RUSSERT TO QUASH GRAND JURY SUBPOENA

Non-party Tim Russert respectfully moves this Court to quash the subpoena served on him on May 21, 2004, commanding that he appear and testify before a grand jury. For the reasons set forth more fully in the accompanying memorandum of points and authorities, and in the Declarations of Tim Russert and Lee Levine submitted herewith, Mr. Russert respectfully submits that the subpoena should be quashed.

REQUEST FOR HEARING

Pursuant to Local Criminal Rule 47(f), Mr. Russert respectfully requests a hearing on this motion.

Dated: June 4, 2004

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE: SPECIAL COUNSEL INVESTIGATION	**Case No.** **(Chief Judge Thomas F. Hogan)** **(UNDER SEAL)**

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION OF NON-PARTY TIM RUSSERT TO QUASH GRAND JURY SUBPOENA

INTRODUCTION

By subpoena issued May 21, 2004, a Special Prosecutor appointed by the Attorney General of the United States seeks to compel Tim Russert, a prominent journalist, to testify before a federal grand jury about both the identity and the substance of confidential communications he had with a source in the course of gathering news. There is no precedent in this Circuit authorizing such extraordinary intrusion into the journalistic process. Accordingly, Mr. Russert now moves to quash the subpoena.

The Special Prosecutor has been authorized by the Department of Justice to investigate allegations that one or more Executive Branch officials unlawfully informed newspaper columnist Robert Novak, and perhaps other journalists, that Valerie Plame, the spouse of former Ambassador Joseph Wilson, served as an operative employed by the Central Intelligence Agency ("CIA"). Mr. Russert has sworn under oath in a declaration filed herewith that he was *not* the recipient of any leak of Ms. Plame's identity or her status as a CIA operative.

Under these circumstances, the Special Prosecutor's subpoena, which purports to compel Mr. Russert to testify before the grand jury about the contents of a communication he allegedly had with a specific Executive Branch official, infringes on Mr. Russert's right to maintain a confidential relationship with his sources. The fundamental importance of a journalist's right to

resist compelled disclosure of confidential communications with news sources is consistently reflected in the law of this Circuit, in the regulations governing the Department of Justice ("DOJ") when it contemplates the issuance of subpoenas to journalists, and in the District of Columbia's "shield law." Accordingly, to permit a prosecutor to compel a journalist both to identify a confidential news source and to testify about the contents of their communications before a grand jury, a reviewing court must determine that there is an overriding need for such testimony and that the information sought may not be secured through alternative means.

In this case, the Special Prosecutor was appointed to investigate and, if appropriate, prosecute those responsible for any unlawful disclosure of Ms. Plame's identity and of her relationship with the CIA. The undisputed fact that Mr. Russert was not a recipient of such a disclosure precludes the Special Prosecutor from demonstrating that his need for such testimony overrides Mr. Russert's right to safeguard his confidential communications with his sources. As a result, the subpoena should properly be quashed because it cannot be squared with the First Amendment, federal common law, or with the applicable DOJ regulations and because it is "unreasonable and oppressive" within the meaning of Fed. R. Crim. P. 17.

STATEMENT OF FACTS

A. The Special Prosecutor's Investigation

On Sunday, July 6, 2003, the *New York Times* published a column by former Ambassador Joseph Wilson entitled "What I Didn't Find in Africa." *See* Declaration of Lee Levine ("Levine Decl.") Ex. A. Ambassador Wilson charged that President Bush had "twisted" intelligence related to Iraq's nuclear program in his 2003 State of the Union Address in an effort "to exaggerate the Iraqi threat." *Id.* That same day, Ambassador Wilson appeared on NBC's *Meet the Press*, hosted on that occasion by NBC Correspondent Andrea Mitchell. *See id.* Ex. B.

During that program, he discussed his conclusion, reached after visiting Niger at the behest of the CIA in February 2002, that Iraq had not attempted to purchase uranium yellowcake from Niger in the late 1990s, as the President had suggested in the State of the Union Address. *Id.*

Throughout the following week, Ambassador Wilson's statements were the subject of substantial news coverage and he repeated and expanded upon them in published and broadcast interviews. *See id.* Ex. C. On July 14, Robert Novak, in a column published in the *Washington Post* and other newspapers, also wrote about Ambassador Wilson and his CIA-sponsored trip to Niger. *See id.* Ex. D. In that column, Novak reported that Wilson's "wife, Valerie Plame, is an agency operative on weapons of mass destruction. Two senior administration officials told me his wife suggested sending Wilson to Niger." *Id.*

Thereafter, at the request of CIA Director George Tenet, the Justice Department commenced a criminal investigation to determine whether Executive Branch officials had unlawfully disclosed the name of a covert CIA officer to Mr. Novak and other journalists in violation of federal law. *See id.* Ex. E. In September 2003, the *Post* reported that, prior to the publication of Mr. Novak's column in July, "two top White House officials called at least six Washington journalists and disclosed the identity and occupation of Wilson's wife." *Id.*

In December 2003, the Justice Department appointed Patrick J. Fitzgerald, the United States Attorney for the Northern District of Illinois ("the Special Prosecutor"), to conduct its investigation "into the alleged unauthorized disclosure of a CIA employee's identity." *Id.* Ex. F. Since January 2004, the Special Prosecutor has reportedly been presenting evidence to a grand jury in the District of Columbia. *Id.* Ex. G. On May 21, 2004, the Special Prosecutor served a grand jury subpoena on Mr. Russert. *See id.* Ex. H. In a letter to counsel dated June 2, 2004, the Special Prosecutor explained that he seeks to compel Mr. Russert to testify about a telephone

conversation or conversations he allegedly had with a senior Executive Branch official on or about July 10, 2003. *See id.* Ex. I. According to the Special Prosecutor, he intends to question Mr. Russert

> about the following subject matter in the grand jury: telephone conversation(s) between I. Lewis Libby and your client, Tim Russert, on or about July 10, 2003 (and any follow up conversations) which involved Mr. Libby complaining to Mr. Russert in his capacity as NBC Bureau Chief about the on-the-air comments of another NBC correspondent. To be clear, we will also ask whether during that conversation Mr. Russert imparted information concerning the employment of Ambassador Wilson's wife to Mr. Libby or whether the employment of Wilson's wife was otherwise discussed in that conversation.

Id. Mr. Libby serves as Chief of Staff to Vice President Richard Cheney. The Special Prosecutor contends that Mr. Russert's testimony "would not implicate [his] news gathering function" because the questions posed to him before the grand jury "would not elicit any information provided to Mr. Russert in his capacity as a reporter by Mr. Libby acting as a confidential source" and because Mr. Libby has reportedly executed a "waiver of any claim of confidentiality." *Id.*

B. Mr. Russert's Newsgathering

Tim Russert is a professional journalist. For nearly two decades, he has served as Washington Bureau Chief for NBC News and has been the moderator of *Meet the Press* since 1991. Declaration of Tim Russert ("Russert Decl.") ¶¶ 2-3. From its first broadcast in 1949, *Meet the Press* has consistently served the public by imparting important information about our government, the public officials charged with its stewardship, and the public figures who shape national and international events. *Id.* ¶ 3. During the course of his work at NBC, Mr. Russert has interviewed the major figures in American government and international affairs, including Presidents Clinton and Bush and Vice Presidents Gore and Cheney, and has received broad

recognition for the excellence of his journalism, including virtually every major award in the field. *Id.* ¶¶ 3-4.

During his long career in journalism, Mr. Russert has developed relationships with sources of information throughout the federal government. *Id.* ¶ 5. These sources provide information to Mr. Russert based on their shared understanding that they are communicating in confidence and that he will not disclose publicly either their identities or the information provided by them. *Id.* Mr. Russert has determined that, absent such an understanding, public officials simply will not speak freely and candidly about the most important issues of the day. *Id.* In addition, without information provided to him by his sources in confidence, Mr. Russert himself would be substantially hindered in his ability to report contemporary events in an effective and meaningful manner. *Id.* Thus, even when Mr. Russert may not disclose his sources' identities or the information he has received from them, such confidential relationships enhance his own understanding of important public events, his efforts to explain them to NBC's viewers, and his ability to gather news from additional, non-confidential sources. *Id.*

Through the subpoena at issue, the Special Prosecutor seeks to have Mr. Russert both confirm that he communicated with a specific Executive Branch official on or about July 10, 2003, and testify about the contents of the communications. Mr. Russert cannot provide such testimony without compromising the understanding that he shares with his sources that their communications, including the fact that they communicated at all, will not be disclosed by him publicly. *Id.* ¶ 6. As a result, Mr. Russert can neither confirm that he had any communications with the public official at issue during the relevant time period nor describe the nature of any discussions that they may have had. *Id.* Mr. Russert can, however, confirm that he was *not* the recipient of the leak of Ms. Plame's identity or her status as a CIA operative. *Id.*

Moreover, from Mr. Russert's perspective as a journalist, it simply is not relevant that the official at issue has, according to the Special Prosecutor, executed a document that purports to release Mr. Russert and other journalists with whom he may have communicated from any obligation to maintain the confidentiality of their communications. *Id.* ¶ 7. Apparently, several Executive Branch officials have been asked to execute such "waivers" in connection with the Special Prosecutor's investigation, at the direction of the President. *See* Levine Decl. Ex. J. The extent to which such waivers are in fact voluntary is, at the very least, open to serious question. More importantly, if journalists were to consider themselves free to testify when presented with such documents executed by their sources, other public officials would understandably be reluctant to enter into confidential relationships with journalists precisely because of their fear that they would subsequently have no realistic choice but to sign away their anonymity. Thus, even if a source has chosen, for whatever reason, to relinquish his claim to confidentiality, a journalist such as Mr. Russert retains sound, principled and independent reasons to decline to disclose any communications they may have had. *See* Russert Decl. ¶ 7.

ARGUMENT

A. The Testimony Sought Is Protected From Compelled Disclosure By Applicable Law

In this Circuit, a journalist may not be compelled to disclose information received in the course of a confidential relationship with a news source absent extraordinary circumstances. *See, e.g.*, *United States v. Ahn*, 231 F.3d 26, 36 (D.C. Cir. 2000); *Clyburn v. News World Communications, Inc.*, 903 F.2d 29, 35 (D.C. Cir. 1990); *Zerilli v. Smith*, 656 F.2d 705, 713-14 (D.C. Cir. 1981) (a journalist may be compelled to testify about information received in confidence only when it goes to "'the heart of the matter'" under investigation, is "crucial" to the case, and "every reasonable alternative source of information" has been exhausted) (citation

omitted). Indeed, following initial uncertainty in this Court about the extent to which a journalist's immunity from compelled disclosure extends to criminal proceedings, *compare United States v. Hubbard*, 493 F. Supp. 202, 204 (D.D.C. 1979) *with United States v. Liddy*, 354 F. Supp. 208, 215-16 (D.D.C. 1972), the Court of Appeals resolved the issue in *United States v Ahn.* In that case, Judge Sentelle, writing for a unanimous court, expressly affirmed this Court's determination that "reporters possess a qualified privilege not to disclose confidential sources" in criminal cases absent a judicial finding that the reporter's testimony is "'essential and crucial'" to a successful criminal prosecution and that the information sought is not available from alternative sources. 231 F.3d at 37 (quoting district court, Hogan, J.). *See also United States v. Whitmore*, 32 Media L. Rep. 1402, 1410 (D.D.C. 2002) (quashing subpoena to journalist on alternative grounds but noting that "there are very strong arguments" that subpoena sought testimony about communications with confidential source in violation of the "qualified privilege for a journalist"), *aff'd*, 359 F.3d 609 (D.C. Cir. 2004); *Hubbard*, 493 F. Supp. at 205 (in criminal case, subpoena to journalist will not be enforced "unless the information sought is necessary to a just resolution of the case, and it cannot be obtained by alternative means").[1]

The Court of Appeals' holding in *Ahn* reflects the great weight of authority on the subject in the three decades following the Supreme Court's decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972). In *Branzburg*, the Court concluded that the First Amendment did not protect the journalists in the four cases consolidated there from appearing before a grand jury to testify about their eyewitness observations of serious crimes, including illegal drug sales, assassination threats on the President, and violent disorders. *See id.* at 686-87, 690-700. The Court, however,

[1] The Court of Appeals' decision in *Ahn* removed any doubt that its previous discussion of the rights of journalists in *In re Possible Violations of 18 U.S.C. 371, 641, 1503*, 564 F.2d 567, 569 (D.C. Cir. 1977), a case not involving a journalist at all, was *dicta.*

cautioned both that "news gathering is not without its First Amendment protections" and that, absent "protection for seeking out the news, freedom of the press would be eviscerated." *Id.* at 681, 707. And, in a concurring opinion "which determined the outcome in *Branzburg*," *Hubbard*, 493 F. Supp. at 204, Justice Powell emphasized that, especially where a journalist has "reason to believe that his testimony implicates confidential source relationship[s] without a legitimate need of law enforcement, he will have access to the court[s] on a motion to quash and an appropriate protective order may be entered." 408 U.S. at 710 (Powell, J., concurring).[2] Indeed, Justice Powell explained that, in such a case,

> [t]he asserted claim to privilege should be judged on its own facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.

Id. See also Saxbe v. Washington Post Co., 417 U.S. 843, 859-860 (1974) (opinion of Powell, J.) (specific results in *Branzburg* "hinged on an assessment of the competing societal interests involved in that case rather than on any determination that First Amendment freedoms were not implicated"). *Accord United States v. Ahn*, No. CR 98-060, Tr. at 54 (D.D.C. Oct. 6, 1998) (Hogan, J.) (attached hereto as Levine Decl. Ex. K) (court must determine on the facts of each

[2] As Justice Powell indicated, in the confidential source context, a journalist may properly challenge a grand jury subpoena via a motion to quash, without the necessity of appearing before the grand jury itself. *See, e.g., In re Grand Jury Matter (Gronowicz)*, 764 F.2d 983, 984 (3d Cir. 1985) (considering motion to quash filed pursuant to Fed. R. Crim. P. 17(c)); *In re Grand Jury 95-1*, 59 F. Supp. 2d 1, 4 (D.D.C. 1996) (staying enforcement of subpoenas until motion to quash adjudicated). In this case, where the Special Prosecutor has specifically identified the questions that he wishes to put to Mr. Russert before the grand jury, *see* Levine Decl. Ex. I, and where those questions seek testimony about a professional journalist's confidential relationship with his sources, there is no need to await an appearance by Mr. Russert before the grand jury to determine whether the Special Prosecutor can pose such questions. *See* 59 F. Supp. 2d at 4.

case whether the asserted interest in compelled disclosure is sufficient to "override the social interest" in using "confidential sources for free and open reporting").

Since *Branzburg*, therefore, the overwhelming majority of the federal courts have concluded, like the Court of Appeals in *Ahn*, that – at least where a journalist's confidential relationship with news sources is at stake – courts must "strik[e] a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct" on a "case-by-case basis." *Branzburg*, 408 U.S. at 710 (Powell, J., concurring). *See, e.g.*, *United States v. Burke*, 700 F.2d 70, 77 (2d Cir. 1983); *United States v. Cuthbertson*, 651 F.2d 189, 195-96 (3d Cir. 1981); *In re Williams*, 766 F. Supp. 358, 368-69 (W.D. Pa. 1991), *aff'd by equally divided court*, 963 F.2d 567 (3d Cir. 1992) (en banc).[3] As Judge Leventhal explained in *Liddy*, "the *Branzburg* decision is controlled in the last analysis by the concurring opinion of Justice Powell" and, as a result:

> In a grand jury context, the First Amendment considerations cannot prevail, *e.g.*, to preclude a witness from giving information as to a crime he has witnessed. But it may require that the trial judge determine that society has an interest in the subject matter of the proceeding that is "immediate, substantial, and subordinating," that there is a "substantial connection" between the information desired of the witness and the overriding interest of society in the subject matter of the investigation – "and that the means of obtaining the information is not more drastic than necessary to forward the asserted governmental interest," an inquiry which might require the proceeding to move forward deliberately, and reflectively, step-by-step.

United States v. Liddy, 478 F.2d 586, 587 (D.C. Cir. 1972) (opinion of Leventhal, J.) (quoting *Bursey v. United States*, 466 F.2d 1059, 1083 (9th Cir. 1972)). *See also In re Grand Jury*

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[3] *But see United States v. Smith*, 135 F.3d 963, 969 (5th Cir. 1998) (rejecting "a general qualified privilege for newsreporters in criminal cases"); *In re Grand Jury Proceedings*, 810 F.2d 580, 584-86 (6th Cir. 1987) (same).

Subpoenas, 8 Media L. Rep. 1418, 1419 (D. Colo. 1982) ("freedom of the press cannot operate without some protection of its sources, and it does no good to say people have a right to publish but not a right to obtain information to publish").

And, although the Supreme Court has not addressed the subject directly since *Branzburg*, it has otherwise confirmed that the First Amendment in fact encompasses both a right to safeguard the identity of those who wish to disseminate information about matters of public concern anonymously and a right not to disclose confidential communications about such matters at all. In *McIntyre v. Ohio Election Commission*, 514 U.S. 334, 342 (1995), the Court confirmed that "an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment."[4] As a result, the Court explained, any legal obligation to disclose the identity of the source of published information about public matters must be subject to "exacting scrutiny," and can be upheld "only if it is narrowly tailored to serve an overriding interest." *Id.* at 347 (citing *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978)). *See also United States v. Garde*, 673 F. Supp. 604, 607 (D.D.C. 1987) (Hogan, J.) (this Court quashed subpoena seeking identities of informants who provided information to public interest group about the safety of a nuclear reactor because the "First Amendment bars this infringement on constitutionally protected rights unless the government can show a compelling interest that cannot be served by alternative means"). Most recently, in *Bartnicki v. Vopper*, 532 U.S. 514,

[4] In his concurring opinion in *McIntyre*, Justice Thomas traced the source of such First Amendment protection directly to the Founders' experience with the revolutionary era press, when printers – the publishers and broadcasters of the day – could not be compelled to disclose the identity of the authors whose works they published anonymously. *See* 514 U.S. at 367 (Thomas, J., concurring) ("[B]oth Anti-Federalists and Federalists believed that the freedom of the press included the right to publish without revealing the author's name" and "the Framers shared the belief that such activity was firmly part of the freedom of the press.").

533 (2001), the Court recognized a First Amendment right to discuss public matters in confidence precisely because of the "fear" that "public disclosure of private conversations might well have a chilling effect on private speech." *See id.* at 532 n.20 ("'There is necessarily, and within suitably defined areas, a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.'") (quoting *Harper & Row, Publishers, Inc. v. Nation Enterprises,* 471 U.S. 539, 559 (1985)).

In its own regulations, the Department of Justice itself has recognized that "[b]ecause freedom of the press can be no broader than the freedom of reporters to investigate and report the news, the prosecutorial power of the government should not be used in such a way that it impairs a reporter's responsibility to cover as broadly as possible controversial public issues." 28 C.F.R. § 50.10 (preamble). Accordingly, the regulations require that, before a grand jury subpoena may properly issue to a journalist, "there should be reasonable grounds to believe, based on information obtained from nonmedia sources, that a crime has occurred, and that the information sought is *essential* to a successful investigation – particularly with reference to directly establishing guilt or innocence." *Id.* § 50.10(f)(1) (emphasis added). Moreover, the regulations provide that a subpoena issued to a journalist is improper unless the government has first "unsuccessfully attempted to obtain the information from alternative nonmedia sources." *Id.* § 50.10(f)(3).[5]

[5] The DOJ Regulations further require that "[n]o subpoena may be issued to any member of the news media . . . without the express authorization of the Attorney General." 28 C.F.R. § 50.10(e). In this case, the Special Prosecutor has taken the position that he is empowered to issue subpoenas to journalists without further review or authorization within the Department of Justice. This Court should therefore be especially vigilant in scrutinizing the propriety of the subpoena at issue to ensure that it complies with the substantive requirements of the DOJ Regulations.

Although the regulations suggest that the principles they reflect "are not intended to create or recognize any legally enforceable right in any person," *id.* § 50.10(n), this Court has recognized that they properly serve to cabin the Department's ability to enforce subpoenas issued at its behest. *See In re Grand Jury 95-1*, 59 F. Supp. 2d at 5 (holding that the "regulatory requirements" set forth in 28 C.F.R. § 50.10 "apply" to grand jury subpoenas issued to journalists).[6] Indeed, the lion's share of courts that have addressed the issue have reached the same conclusion. *See, e.g., In re Williams*, 766 F. Supp. at 371 (quashing grand jury subpoena in part because "[i]t is manifestly clear that the Government has not discharged the obligation imposed by these regulations"); *United States v. Blanton*, 534 F. Supp. 295, 297 (S.D. Fla. 1982) (quashing subpoena and holding that the federal government "must follow the Department of Justice Guidelines, 28 C.F.R. § 50.10"); *Maurice v. NLRB*, 7 Media L. Rep. 2221, 2224 (S.D.W. Va. 1981), *vacated on other grounds*, 691 F.2d 182 (4th Cir. 1982) (same); *United States v. Hale*, 32 Media L. Rep. 1606 (N.D. Ind. April 14, 2004) (same).[7]

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[6] Indeed, in *In re Grand Jury 95-1*, this Court determined both that an "Independent Counsel" appointed pursuant to 28 U.S.C. § 592(c)(1) was bound by the requirements of 28 C.F.R. § 50.10, and that he had satisfied them based on the facts of that case – *i.e.*, the Independent Counsel had "made reasonable attempts to obtain the information sought from alternative sources," the subpoenaed journalists were "the only source of some of the materials sought," and the subpoenaed materials were "essential to the investigation." 59 F. Supp. 2d at 6-8. As a result, Judge Penn enforced a grand jury subpoena seeking testimony about a journalist's unpublished, but non-confidential work product. *Id.* at 10-14. Even then, however, he took pains to emphasize that the result would likely be different where, as here, "confidential sources" are involved. *Id.* at 10-13.

[7] The contrary decision articulated by some courts outside this Circuit, *see, e.g., In re Shain*, 978 F.2d 850, 853-54 (4th Cir. 1992) (reasoning by analogy to *United States v. Caceres*, 440 U.S. 741 (1979), court concluded that the DOJ Regulations are "of the kind to be enforced internally by a governmental department, and not by the courts"); *In re Grand Jury Subpoena (American Broad. Co.)*, 947 F. Supp. 1314, 1322 (E.D. Ark. 1996) (citing *Shain*)), cannot be reconciled with the law of this Circuit. *See Lopez v. Federal Aviation Admin.*, 318 F.3d 242, 247 (D.C. Cir. 2003) (holding that a "'court's duty to enforce an agency regulation [,while] most evident when compliance with the regulation is mandated by the Constitution or federal law,' embraces as well agency regulations that are not so required") (quoting *Caceres*, 440 U.S. at

In addition, journalists who gather news in the District of Columbia generally enjoy the protections of this jurisdiction's "shield law." *See* D.C. Code §§ 16-4701 to 4704. That statute not only affords journalists in the nation's capital substantial protection against the compelled disclosure of "[a]ny news or information" they procure "in the course of pursuing professional activities that is not itself communicated in the news media," it provides them with the absolute right to resist the compelled disclosure of "the source of any news or information." *Id.* §§ 16-4702(1)-(2) & 16-4703. In cases such as this, federal courts properly look to state law generally – and to their "shield laws" specifically – for guidance in ascertaining the scope of protection against compelled disclosure afforded by federal common law and the First Amendment. *See, e.g., von Bulow v. von Bulow*, 811 F.2d 136, 144 (2d Cir. 1987); *United States v. Cuthbertson*, 630 F.2d 139, 146 n.1 (3d Cir. 1980); *Baker v. F&F Investment,* 470 F.2d 778, 780 (2d Cir. 1972); *Gray v. Hoffman-LaRoche Inc.*, 30 Media L. Rep. 2376 (D.D.C. 2002); *Grunseth v. Marriott Corp.*, 868 F. Supp. 333, 336 (D.D.C. 1994).

Finally, under the Federal Rules of Criminal Procedure, a district court retains broad discretion to quash a grand jury subpoena "if compliance would be unreasonable or oppressive." Fed. R. Crim. P. 17(c)(2). *See generally Bowman Dairy Co. v. United States*, 341 U.S. 214, 220 (1951); *United States v. Nixon*, 418 U.S. 683, 699-700 (1974). Courts have exercised such discretion in the context of subpoenas issued to journalists, even where the subpoena at issue did not seek testimony about a journalist's confidential relationship with his sources, but only production of the "outtakes" of broadcast interviews. *See, e.g., United States v. Cuthbertson*, 630 F.2d at 144; *United States v. Cuthbertson*, 651 F.2d at 195. In determining whether a grand jury subpoena issued to a journalist is "unreasonable or oppressive" within the meaning of Rule

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749) (alteration in original). *Accord In re Williams*, 766 F. Supp. at 371 n.13 (interpreting *Caceres* to require that court enforce 28 C.F.R. § 50.10 in grand jury context).

17(c), therefore, a court must properly consider the totality of the circumstances. In this case, those circumstances include that fact that the Special Prosecutor seeks to compel a journalist to disclose against his will information about his confidential relationships with news sources even though such information does not appear to be directly relevant to the allegations of criminal activity that prompted the investigation at issue. *See* pp. 18-19 *infra.*

For all of these reasons, Mr. Russert enjoys a presumptive right to maintain a confidential relationship with his news sources. This right is conferred and protected by the First Amendment, federal common law, the Code of Federal Regulations, the District of Columbia Code, and the Federal Rules of Criminal Procedure. Under the law of this Circuit, a journalist cannot be compelled to testify about either the identities of his sources or the substance of his confidential communications with them absent a judicial finding, on the facts of the specific case at hand, that the journalist's testimony is "'essential and crucial'" to a successful criminal prosecution. *Ahn*, 231 F.3d at 37 (quoting district court, Hogan, J.). As we explain further below, the Special Prosecutor cannot make that showing in this case.

B. The Special Prosecutor Cannot Make The Extraordinary Showing Required To Compel Disclosure In This Case

In his letter dated June 2, 2004, the Special Prosecutor has indicated that he seeks to compel Mr. Russert to testify about one or more conversations that he allegedly had with a senior Executive Branch official on or about July 10, 2003. *See* Levine Decl. Ex. I. The Special Prosecutor does not contend that, during these conversations, this official provided Mr. Russert with information concerning either Ms. Plame's identity or her employment at the CIA. Indeed, Mr. Russert has sworn under oath that he was not the recipient of any such "leak." Russert Decl. ¶ 6. Under these circumstances, the Special Prosecutor cannot make the requisite showing that Mr. Russert's testimony is "essential and crucial" to his core mission.

At this juncture, we have only very limited information concerning the basis for the Special Prosecutor's contention that he may nevertheless compel Mr. Russert to testify.[8] Based on what we do know, we anticipate that the Special Prosecutor will advance three arguments in that regard: (1) that Mr. Russert was not acting in his capacity as a journalist when he allegedly communicated with the Executive Branch official at issue; (2) that the official has executed a "waiver," which allegedly serves to relieve Mr. Russert of any obligation to maintain communications they may have had in confidence; and (3) that, although Mr. Russert may not have direct evidence concerning the source of the leak the Special Prosecutor was appointed to investigate, he may have information directly relevant to establishing that a different crime may have been committed "in the course of, and with the intention to interfere with" his investigation. Levine Decl. Ex. F. While a full response to these contentions must necessarily await the Special Prosecutor's submission in opposition to this Motion, several preliminary observations are nevertheless in order.

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[8] In this regard, we understand that the Special Prosecutor may respond to this Motion, in substantial part, by making an *ex parte* submission to the Court. Under the circumstances of this case, we respectfully suggest that an *ex parte* submission is both unnecessary and inappropriate. Until and unless the Court determines otherwise, all filings in connection with this proceeding have and will be made under seal. Thus, there is simply no legitimate reason to deny Mr. Russert's counsel the opportunity to ascertain and respond to the Special Prosecutor's arguments. *See, e.g.*, *In re Taylor*, 567 F.2d 1183, 1187-88 (2d Cir. 1977) ("In camera proceedings are extraordinary events in the constitutional framework because they deprive the parties against whom they are directed of the root requirements of due process, i.e., notice setting forth the alleged misconduct with particularity and an opportunity for a hearing."); *In re John Doe, Inc.*, 13 F.3d 633, 636 (2d Cir. 1994) (*in camera* submission "'deprive[s] one party to a proceeding of a full opportunity to be heard on an issue' and its use is justified only by a compelling interest") (quoting *In re John Doe Corp.*, 675 F.2d 482 (2d Cir. 1982)); *In re Sealed Case No. 98-3077*, 151 F.3d 1059, 1075 (D.C. Cir. 1998) ("*in camera, ex parte* submissions 'generally deprive one party to a proceeding of a full opportunity to be heard on an issue,' and thus should only be used where a compelling interest exists") (citations omitted).

First, the Special Prosecutor appears to contend that the subpoena at issue does not "implicate Mr. Russert's news gathering function" both because he allegedly received a telephone complaint from a public official "in his capacity as NBC Bureau Chief about the on-the-air comments of another NBC correspondent," and because the subpoena seeks testimony only about what Mr. Russert allegedly said in that conversation. *See* Levine Decl. Ex. I. With all due respect, in advancing this argument, the Special Prosecutor misperceives the nature of the newsgathering process and, specifically, the nature of the confidential relationship between a journalist and his sources. Simply put, such a relationship routinely develops over time and is based on the shared understanding that, unless the parties agree otherwise with respect to a specific communication, all of the information they share with each other remains confidential. *See, e.g.*, E. Abel, *Leaking: Who Does It? Who Benefits? At What Costs?* 10 (1987); M. Linsky, *Impact: How the Press Affects Federal Policymaking* 171 (1986); D. Broder, *Behind the Front Page* 317-22 (1987). That is certainly the understanding that Mr. Russert has with the news sources with which he maintains a confidential relationship. *See* Russert Decl. ¶ 5. A conversation between a prominent journalist and a senior government official cannot be artificially parsed or surgically divorced from the realities of newsgathering, as the Special Prosecutor apparently contends. Indeed, the Special Prosecutor has confirmed that he seeks to ask Mr. Russert about "whether the employment of Wilson's wife was otherwise discussed," presumably by either party, in the conversation about which he seeks to inquire. Levine Decl. Ex. I.

And, there is no basis for the Special Prosecutor's suggestion that the purpose for which a source contacts a journalist somehow governs whether their subsequent communications implicate the newsgathering function. To the contrary, the full-time occupation of a journalist

such as Mr. Russert is to uncover newsworthy information from his sources, whether he encounters them in a formal interview, at a cocktail reception, or in a phone call initiated by one of them to complain about news coverage. Russert Decl. ¶ 5; *see* Monica Langley & Lee Levine, *Branzburg Revisited: Confidential Sources and First Amendment Values*, 57 G.W. L. Rev. 13, 26-27 (1988) ("Accomplished political journalists devote a significant portion of their days to talking with policymakers, 'taking them to lunch,' and establishing 'rapport' that can be used to solicit meaningful information when press releases and official government statements are incomplete, uninformative, or misleading") (citing S. Trausch, *It Came From the Swamp: Your Federal Government at Work* 31 (1986); S. Hess, *The Washington Reporters* 16 (1978)). Once again, the Special Prosecutor appears to misapprehend the fluid nature of a journalist's relationship with his sources and relies instead on an unrealistically rigid view of how these communications truly transpire. In the last analysis, the fact remains that, as the Special Prosecutor freely acknowledges, this subpoena seeks to compel Mr. Russert to disclose whether he had a communication with a specific source of information about a specific subject – this he cannot do without compromising his right to maintain confidential relationships with his sources.

Second, it is well settled, and for good reason, that the right to resist compelled disclosure belongs to the journalist and cannot be "waived" by his sources. In *Palandjian v. Pahlavi*, 103 F.R.D. 410, 413 (D.D.C. 1984), the defendant in a civil action subpoenaed a third-party journalist to testify about the content of interviews he conducted with her. Despite the fact that the source herself issued the subpoena, this Court concluded that the journalist's "First Amendment interests outweigh defendant's interest in enforcing the subpoena," precisely because "the privilege belongs to the movant journalist and not to the defendant" source. *Id.* The Court held that this fact was "dispositive[]" because, "even if the notes and tapes in question

are of defendant's own words, she is not entitled to 'waive' the privilege for the movant." *Id.* Indeed, in circumstances analogous to those at issue in this case, the Third Circuit has expressly held that "the fact that the government has obtained waivers from its witnesses" does not operate to strip a journalist of his right to maintain their communications in confidence because the right "belongs to" the journalist, "not the potential witnesses, and it may be waived only by its holder." *United States v. Cuthbertson*, 630 F.2d at 147. *Accord Los Angeles Memorial Coliseum Comm'n v. National Football League*, 89 F.R.D. 489, 494 (C.D. Cal. 1981).

In this case, the Special Prosecutor points to "waivers" purportedly executed by Executive Branch officials at the behest of the President. As Mr. Russert has explained, and as common sense dictates, the coercion implicit in the procurement of such a document diminishes its value as an accurate reflection of the source's actual intentions. *See* Russert Decl. ¶ 7. More importantly, if such "waivers" are credited by the courts as a basis for compelling reporters to testify about their confidential relationships with their sources, journalists such as Mr. Russert will have increasing difficulty in establishing and maintaining such relationships with sources fearful that they too will be required to execute a "waiver." *Id.* In that event, the public will inevitably be deprived of important information about the operations of its government.

Finally, the Special Prosecutor does not allege that Mr. Russert was the recipient of any leak of Ms. Plame's identity or of her role at the CIA. Indeed, Mr. Russert has sworn under oath that he was not. *Id.* ¶ 6. Thus, the alleged communications with a senior Executive Branch official about which the Special Prosecutor seeks to inquire will, at most, reveal information collateral to the events that prompted his appointment. Moreover, there are plainly alternative sources of the information that is "essential" to *that* investigation.

In the unique circumstances of this proceeding, therefore, the Special Prosecutor ought not be entitled to compel disclosure of confidential communications from Mr. Russert by arguing that they promise to yield evidence pertaining to some offense other than the unlawful disclosure of Ms. Plame's identity. By definition, such evidence is neither "crucial" nor "essential" to the Special Prosecutor's core mission. *Ahn*, 231 F.3d at 37. As we have demonstrated in this memorandum, a journalist's right to maintain the confidentiality of his relationships with his sources can be compromised only in the cause of vindicating an overriding interest. However well intentioned, a Special Prosecutor charged with investigating a particular instance of unlawful conduct cannot evade his obligation to carry that deliberately heavy burden by shifting his focus and contending that a journalist's testimony is directly relevant to some collateral pursuit. Simply put, the Special Prosecutor's interest in pursuing such matters does not "override the societal interest" in facilitating "free and open reporting" by preserving Mr. Russert's right to maintain the confidences of his sources. *Ahn*, No. CR 98-060, Tr. at 54. *See also Liberty Lobby, Inc. v. Rees*, 111 F.R.D. 19, 21-22 (D.D.C. 1986) (testimony sought to be compelled in defamation action did not go to "the heart of the case" because it was directly relevant to only one of many allegedly defamatory statements).

CONCLUSION

For all of the foregoing reasons, Non-Party Movant Tim Russert respectfully requests that the grand jury subpoena issued to him be quashed.

Dated: June 4, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 4th day of June 2004, I caused a true and correct copy of the foregoing Motion of Non-Party Tim Russert to Quash Grand Jury Subpoena and Memorandum of Points and Authorities in Support thereof, Declaration of Tim Russert, Declaration of Lee Levine (and exhibits thereto), and Proposed Order, to be served via facsimile and first-class mail upon:

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